

abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.¹³

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of NASD. All submissions should refer to file number SR-NASD-2003-97 and should be submitted by July 28, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48106; File No. SR-PCX-2002-62]

Self Regulatory Organizations; The Pacific Exchange, Inc.; Order Granting Approval to Proposed Rule Change To Amend the PCX's Market Data Revenue Sharing Program for Tape A Securities Traded on the Archipelago Exchange

June 27, 2003.

On October 4, 2002, The Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange

Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ a proposed rule change to modify its market data revenue sharing program for Tape A securities by increasing the level of the transaction credits paid with respect to transactions in Tape A securities from 40% to 50% for Users (as defined in the notice) that meet certain requirements. The proposed rule change, as amended, was published for notice and comment in the **Federal Register** on November 19, 2002.² The Commission received two comments on the proposal.³ On May 12, 2003, the PCX responded to the comment letters.⁴

The PCX proposes to modify its Tape A market data revenue sharing program by increasing the percentage of transaction credits from 40% to 50%, a percentage that is consistent with similar market data revenue sharing programs operated by other self-regulatory organizations.⁵ As set forth in its July 2, 2002 Order of Summary

¹ 15 U.S.C. 78s(b)(1).

² See Securities Exchange Act Release No. 46805 (November 8, 2002), 67 FR 69794.

³ See December 10, 2002 letter from Darla C. Stuckey, Corporate Secretary, The New York Stock Exchange, Inc. ("NYSE"), to Jonathan G. Katz, Secretary, Commission ("NYSE Letter"); December 20, 2002 letter from W. Hardy Callcott, Senior Vice President and General Counsel, Charles Schwab & Co., Inc., to Jonathan G. Katz, Secretary, Commission ("Schwab Letter"). The Schwab Letter comments generally on market data revenue sharing, and does not specifically address the PCX's proposal to increase the percentage of market data revenue sharing in Tape A securities from 40% to 50%. The NYSE Letter incorporates by reference comments filed in previous proposed rule changes on the subject of market data revenue sharing programs, and further objects to the proposed rule change because the NYSE believes the proposal (1) "would cause NYSE to fund even more PCX payment for [order] flow than it currently does, which payments withdraw orders from the auction for reasons other than best execution"; (2) would present conflict of interest problems for PCX broker-dealers, thereby undermining the discharge of best execution obligations; and (3) "would provide incentives for markets to purchase prints of trades not executed through their facilities," skewing the perception of a particular market's liquidity" which would result in that market receiving market data revenue in contravention of the Consolidated Tape Association Plan.

⁴ See May 12, 2003 letter from Kathryn L. Beck, Senior Vice President, General Counsel, Corporate Secretary, and Chief Regulatory Officer, PCX, to Joseph Morra, Special Counsel, Division of Market Regulation, Commission ("PCX Response Letter"). The PCX limited its response to the concerns raised in the NYSE Letter. In short, the PCX (1) stated it does not pay for order flow, and does not fund its market data revenue sharing program directly or indirectly; (2) denied that the market data revenue sharing program conflicts with broker-dealers' best execution obligations; and (3) states that the PCX cannot print trades that are executed elsewhere.

The NYSE Letter, the Schwab Letter, and the PCX Response Letter are available in the Public Reference Room.

⁵ See e.g., Securities Exchange Act Release No. 46911 (November 26, 2002), 67 FR 72251 (December 4, 2002)(SR-BSE-2002-10).

Abrogation ("Abrogation Order"),⁶ the Commission will continue to examine the issues surrounding market data fees, the distribution of market data rebates, and the impact of market data revenue sharing programs on both the accuracy of market data and on the regulatory functions of self-regulatory organizations. In the interim, the Commission believes it is reasonable to allow the PCX to operate market data revenue sharing programs that place the PCX on substantially similar footing as other self-regulatory organizations.

Thus, after careful review of the proposed rule change, the comment letters, and the PCX Response Letter, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange⁷ and, in particular, the requirements of section 6 of the Act⁸ and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with section 6(b)(5) of the Act,⁹ in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating securities transactions, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The decision to allow the PCX to increase the percentage of transaction credits available from 40% to 50%, however, is narrowly drawn, and should not be construed as resolving the issues raised in the Abrogation Order, and does not suggest what, if any, future actions the Commission may take with regard to market data revenue sharing programs.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-PCX-2002-62), be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,
Deputy Secretary.

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⁶ Securities Exchange Act Release No. 46159 (July 2, 2002), 67 FR 45775 (July 10, 2002)(File Nos. SR-NASD-2002-61, SR-NASD-2002-68, SR-CSE-2002-06, and SR-PCX-2002-37)(Order of Summary Abrogation).

⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).

¹³ See 15 U.S.C. 78s(b)(3)(C). For purposes of calculating the 60-day abrogation period, the Commission considers the period to commence on June 27, 2003, the date that NASD filed Amendment No. 1.

¹⁴ 17 CFR 200.30-3(a)(12).